EXTRACTS FROM TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 143.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ELIAS B. BARNES.

APPEAL FROM THE COURT OF CLAIMS.

RECORD FILED NOVEMBER 21, 1902.

(19,135.)

(19,135.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 484.

THE DISTRICT OF COLUMBIA, APPELLANT,

vs.

ELIAS E. BARNES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 4, 1904.

(Record, page 1.)

Court of Claims.

ELIAS E. BARNES
vs.
THE DISTRICT OF COLUMBIA. } No. 47, D. C.

I.—*Original Petition.*

Filed August 4, 1880.

To the honorable the judges of the Court of Claims:

The petition of Elias E. Barnes respectfully represents:

1. That he is a citizen of the United States and a resident of the District of Columbia.

2. That subsequent to February 21, 1871, and prior to December 1, 1875, under contracts with the Board of Public Works and with the Commissioners of said District of Columbia, he had done and performed a large amount of work in the improvement of North Carolina avenue between New Jersey avenue and Fourth street southeast, as appears by the measurements on file in said District, together with extra work done under orders of the District authorities, and that upon a just settlements of his said accounts and for material furnished, there was due him on said February 1, 1876, a balance of thirty-six thousand nine hundred and eighty-seven and 11/100 dollars.

3. That upon a just settlement of his accounts for the improvement of D street southeast between New Jersey avenue and Sixth street, there was due him on said December 1, 1875, a balance of fifteen hundred and twenty-four 63/100 dollars, for work done and materials furnished under contracts with said Board of Public Works and the Commissioners of said District.

4. That there was also due him at said date for work done and materials furnished in the improvement of Third street southeast from D street to the river under contracts as aforesaid, the further sum of eight thousand two hundred and twelve 36/100 dollars as the balance of his account on said street.

5. That upon settlement of his account for the improvement of E street southeast between First and Sixth streets, under contracts as aforesaid, there was at said date due him the further sum of one hundred and 69/100 dollars.

6. That upon settlement of his accounts for the improvement of C street southeast between South Capitol and Third streets, under contracts as aforesaid, there was due him at said date a balance of twenty-two hundred and eighty and 2/100 dollars.

7. That upon settlement of his accounts for the improvement of M street south between Fourth street east and Four-and-a-half street west, under contracts as aforesaid, there was due him at said date the further sum of eleven thousand six hundred nine and 14/100 dollars.

8. That for taking up and removing brick pavements, curb, gutters and other old material under orders from the said Board of Public Works prior to August 1st, 1874, there is justly due him the sum of five thousand four hundred twenty-six and 74/100 dollars.

9. That upon settlement of his account for work done on Second street southeast, made in January 1876, there was retained a percentage of one hundred seventy-one and 69/100 dollars which is still due and unpaid.

10. That upon settlement of his accounts for putting down a pipe and brick sewer on I street southeast between Second and Third streets, there was withheld from him a percentage amounting to forty-nine and 29/100 dollars for work done prior to January 1, 1875, as per board of audit voucher No. 14129.

And petitioner avers that said several sums amounting in the whole to sixty-six thousand three hundred sixty-one and 67/100 dollars are still due and unpaid, and he prays judgment therefor against the said District of Columbia.

E. E. BARNES.

Elias E. Barnes, the petitioner aforesaid, says that the facts stated in the foregoing petition are true, that he is justly entitled to the amount therein claimed after allowing all just credits and offsets. That no assignment or transfer of said claim *as* any part thereof or interest therein has been made other than two powers of attorney to one S. J. Ritchie to collect two small sums, one of six thousand dollars and one of five thousand dollars, both of which said power- of attorney have been revoked by written instrument, duly executed and filed with notice; and one unrevoked power of attorney to said Ritchie to collect one thousand dollars on account.

Sworn to and subscribed this 3d day of August A. D., 1880, before me—

CHARLES WALTER,
United States Comm'r.

Claimant's address, Washington, D. C.

SAM M. WILCOX,
Att'y for Claimant, Washington, D. C.

(Record, page 2.)

II.—*General Traverse.*

Filed December 10, 1880.

And now comes the Attorney General, on behalf of the District of Columbia, and answering the petition of the claimand herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

THOMAS SIMONS,
Assistant Attorney General.

(Record, page 3.)

IV.—*Plea of Set Off.*

Filed January 26, 1882.

ELIAS E. BARNES
vs.
THE DISTRICT OF COLUMBIA. } No. 47.

And now comes the Attorney-General on behalf of the District of Columbia, and for a further plea says:

That at and before the institution of this suit, the claimant was and still is indebted unto the District of Columbia in the full and just sum of $25,000 for money had and received to the use of the defendant, and the said claimant being so indebted as aforesaid, in consideration thereof promised to pay the defendants the said sum of money on request; yet the said claimant, although often requested so to do, hath not, nor hath any one in his behalf, as yet paid the same sum or any part thereof, but hath wholly neglected and refused, and still neglects and refuses, so to do; which said sum so due as aforesaid the defendant claims to set off against the demand of the claimant, and thereupon he brings his counter claim.

THOMAS SIMONS,
Assistant Attorney-General.

(Record, page 3.)

V.—*Replication.*

Filed February 10, 1882.

Now comes the claimant by H. E. Paine, his attorney, and for replication to the plea of set off herein filed on the 26th day of Janu-

ary, 1882, says that by reason of anything in the said plea alleged, he ought not to be barred from having and maintaining his aforesaid action against the said defendant, because he says that he is not indebted to the said defendant in the sum of $25,000, as in said plea alleged, or in any other sum, and that he has not, at any time, promised to pay said sum or any part thereof to said defendant; wherefore he prays judgment for the sum of $66,174.36 as demanded in his petition herein filed.

ELIAS E. BARNES,
By H. E. PAINE, *Att'y.*

DISTRICT OF COLUMBIA, *ss:*

Elias E. Barnes, having been duly sworn, says that he is the claimant named in the foregoing replication, and that said replication is true.

Subscribed and sworn to before me, Elias E. Barnes, this 10th day of February, 1882.

RUTLEDGE WILLSON,
Notary Public.

(Record, page 29.)

XII.—*Findings of Fact and Conclusions of Law Filed by the Court.*

March 31, 1902.

ELIAS E. BARNES
v.
DISTRICT OF COLUMBIA.

This case having been heard before the Court of Claims, the court, upon the evidence, makes the following findings of fact.

I.

Prior to April 29, 1872, the Board of Public Works of the District of Columbia had, by order entered on their records, fixed the price of certain work to be done in the improvement of streets in the city of Washington, among which were the following:

"For grading from and after January 22, 1872, 30 cents per cubic yard, including the hauling of the earth excavated, not to exceed 200 feet; and for each 200 feet hauled beyond the first 200 feet 1 cent additional per cubic yard.

"For grading old graveled streets to a depth of 2 feet, 40 cents per cubic yard."

And on said April 29, 1872, the said board, as shown by their records, awarded to the claimant herein at the rate, so fixed, among others, a contract of which the claimant was notified in writing

about which there is no controversy, and the contract clerk of said board was directed to prepare the contract accordingly.

The said clerk prepared a contract designated as contract No. 264, which was executed by the parties in these words:

"*Contract No.* 264.

"This contract, made and concluded this 29th day of April, in the year one thousand eight hundred and seventy-two, by the Board of Public Works of the District of Columbia of the first part and Elias E. Barnes, of Washington, D. C., of the second part, witnesseth:

"First. That the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents, and hereunto annexed—

"To furnish at his own proper cost and expense all the necessary materials and labor, and in a good, firm, and substantial manner to grade D street south, from Fourth street east to New Jersey avenue, in the city of Washington, D. C.; also to grade North Carolina avenue from Fourth street east to New Jersey avenue, in the city of Washington, D. C.

"Also to construct, with the necessary manholes, an eighteen (18) inch pipe sewer from Providence hospital, at the corner of said D and Second streets S. E., through the Government reservation at the intersection of D street S. E. and North Carolina avenue, to the main sewer on said D street S. E.; also, so soon as the connections of said sewer, as above, are made and completed, to take up and remove the old brick sewer now down and through said Government reservation, the work of said grading and sewering to be executed, in every respect, in conformity with the specifications following, to-wit:

* * * * * * *

"Second. It is further agreed that the said party of the first part shall appoint, from time to time, such person or persons as may be by said party deemed proper, to inspect the material to be furnished and the work to be done under this contract, and that such person or persons shall have any and all opportunity and privileges which may be necessary to enable them to faithfully make the inspection aforesaid.

"Third. It is further agreed that the work under this contract shall be commenced on or before the fourth day of May, one thousand eight hundred and seventy-two.

"Fourth. It is further agreed that the said party of the first part may, on notice to the party of the second part, suspend work under this contract; but if not suspended, it shall be completed within ninety days from the date fixed for its commencement, and that the

said work shall not be sublet without the consent in writing of the said party of the first part. And any subletting or assignment without such consent shall work a forfeiture of this contract.

* * * * * * *

"Sixth. It is further agreed that all loss or damage arising out of the nature of the work to be done under this agreement, or from any unfor-seen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from incumbrances to individuals, property, or otherwise, on the line of the work, or adjacent thereto, shall be sustained by the said contractor.

* * * * * * *

"Eighth. And it is further agreed that partial payments shall be made by the duly authorized financial agent of the said party of the first part on the monthly estimates of the chief engineer of the Board of Public Works aforesaid, and that whenever the said chief engineer aforesaid shall certify, in writing, that the party of the second part completely performed this contract on his part, and shall submit, with said certificate, his estimate of the amount due the party of the second part, then, within thirty days, as hereinafter provided, the said party of the second part shall be entitled to receive the full amount due under this contract, deducting therefrom all previous partial payments which may have been made, as hereinafter mentioned.

"And it is further expressly agreed that no money shall become due and payable under this contract except upon the certificate of said engineer, as hereinbefore provided; and the said party of the second part further agrees that he shall not be entitled to demand or receive payment for any portion of the aforesaid work except in the manner set forth in this agreement; and when each and all of the stipulations hereinbefore mentioned are complied with, and the engineer shall have given his certificate to that effect, a final settlement shall be made in writing between the parties, and the whole amount found due the party of the second part under this contract shall be paid to him, excepting such sum or sums as may be retained under any provision of this contract; provided that partial payments may be made, under direction of the board, otherwise than upon the estimates of the engineer, as provided above, if, in the opinion of the board, the vigorous prosecution of the work will be promoted thereby.

* * * * * * *

"Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

"Grading, thirty (30) cents for each and every cubic yard of earth, sand, or gravel excavated and hauled a distance not exceeding two

hundred (200) feet, and one cent additional per cubic yard for every two hundred (200) feet beyond the above.

"Eighteen (18) inch pipe, per lin. ft., $1.62.

Manholes:

6 ft. deep or under	$31.68
Over 6 ft. deep and not more than 8 ft. deep	42.24
" 8 " " " " " " 10 " "	52.80
" 10 " " " " " " 12 " "	63.36
" 12 " "	73.92

"Excavation and refilling, forty (40) cents per cubic yard, to be measured in excavation only.

"Taking up and removing old brick sewer.

"Which said sums or prices the said party of the first part shall pay to the said party of the second part as herein provided.

"Eleventh. It is further agreed that the measurements shall be made by the engineer of the board or his assistants. * * *

"In witness whereof, &c. * * *"

II.

That by mistake in the drafting of said contract the rate of 40 cents for grading old gravel streets to a depth of 2 feet was omitted therefrom; that said Board of Public Works and said claimant, by mutual mistake, executed said contract without observing said omission.

III.

That under and pursuant to said contract the claimant excavated on North Carolina avenue, to bring said street to the then established grade, 32,739 cubic yards, and on D street—both in said city—about 4,267 cubic yards of excavation, which work was completed about August 22, 1872.

IV.

In September, 1873, the Board of Public Works increased the price for hauling earth from 1 cent per cubic yard for 200 feet, to 1¼ cents per cubic yard for 100 feet of hauling beyond the first 200 feet, and made said rate applicable to all work done after January 1, 1873.

V.

Thereafter, in 1874, the Commissioners of the District of Columbia established a new grade for North Carolina avenue and directed the claimant to further excavate said street, in order to conform the same to the newly established grade, with the understanding and agreement, verbally made, that the claimant should be paid therefor, the then existing board rates in certificates, convertible into

bonds of the District of Columbia bearing interest at the rate of 3.65 per cent.

VI.

That subsequent to the execution of said contract No. 264, set forth in the first finding herein, said claimant entered into other contracts with the Board of Public Works and the Commissioners of said District, the first of which was effected by said board and the residue by the Commissioners, designated as extensions of said contract No. 264, in these words:

"*First Extension of Contract No.* 264.

"By and between Board of Public Works and said Barnes.

"It is hereby agreed that this contract, with its various terms, conditions, and stipulations (except as respects the time of execution), shall be extended so as to embrace the setting of curbstones and the laying and putting down of brick foot pavements on North Carolina avenue, between New Jersey avenue and Fourth street S. E., in the city of Washington D. C.

"Also the setting the curbstones and the laying and putting down of the brick foot pavements on D street S. E., between New Jersey avenue and Fourth street S. E., in the city of Washington D. C.

"Also the gravelling of said D street S. E., between Sixth and Seventh streets S. E., in the city of Washington, D. C.

"Also the gravelling of the carriageway of North Carolina avenue from Pennsylvania avenue to New Jersey avenue, in the city of Washington, D. C.

"Also the grading, the setting of curbstones, and the laying and putting down of the brick foot pavements on D street S. E. from Fourth to Sixth street- S. E., and the terracing of said D street S. E. from Second to Fourth street- S. E., in the city of Washington, D. C.

"Also the grading of E street S. E. from Second to Sixth streets S. E., in the city of Washington, D. C.

"The said work to be paid for at board rates for said work, and to be begun and completed immediately, and said work to be executed in every respect in conformity with the accompanying specifications.

"Witness our hands and seals the twenty-first day of May, A. D. 1873."

"*Second Extension of Contract No.* 264.

"For and in consideration of the stipulations hereinafter contained it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 264 in the series of contracts made by the Board of Public Works of the Dis-

trict of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, viz:

"Grade M street south, between 3d street east and James Creek canal.

"It is further agreed that the said Elias E. Barnes shall receive the prices established and paid by the Board of Public Works for work of similar character, provided that payment be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

"It is further agreed that the work herein specified shall be completed by the first day of November, 1875, under penalty of forfeiture of all right and title to perform the same.

"In witness whereof the Commissioners of the District of Columbia, successors to the Board of Public Works, appointed under the act of Congress entitled 'An act for the government of the District of Columbia, and for other purposes,' approved June 20, 1874, and the party of the second part to these presents have hereunto set their hands and seals this 19th day of June, 1875."

"*Third Extension of Contract No.* 264.

"For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 264 in a series of contracts made by the Board of Public Works of the District of Columbia be, and the same is hereby, extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit:

"Replace all suitable old material on E street south, between 2d and 6th streets east.

"It is further agreed that the work herein specified shall be completed by the 30th day of December, 1875, under penalty of forfeiture of all right and title to perform the same.

"It is further agreed that the said Elias E. Barnes shall receive the prices established and paid by the Board of Public Works for work of similar character; provided, that payment be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

"In witness whereof the Commissioners of the District of Columbia, successors of the late Board of Public Works, appointed under the act of Congress entitled 'An act for the government of the District of Columbia, and for other purposes,' approved June 20, 1874, and the party of the second part to these presents has hereunto set his hand and seal this 21st day of December, 1875."

VII.

That after the change of grade of North Carolina avenue as aforesaid, the claimant excavated 64,573.6 cubic yards, measured by the engineer officers of said District March and December, 1875, and January, 1876, for which excavation, according to the verbal agreement with the Commissioners aforesaid, the claiment was to receive the rate so established and paid by the Board of Public Works, including 1¼ cents per cubic yard for every 100 feet of excavation hauled beyond the first 200 feet, which was to be paid in bonds of the District of Columbia as aforesaid.

VIII.

That subsequent to the execution of said contract No. 264, and before the Commissioners of said District had directed the claimant to proceed to a further excavation of North Carolina avenue to bring it to the new grade so established by said Commissioners, the Board of Public Works had established by payment to several contractors, *i. e.*, four or five, for like work, the rate of 60 cents per cubic yard for stiff clay excavation, which the court finds was a reasonable price therefor.

IX.

That under said contract No. 264 and the extensions thereof, and as re-formed by the insertion of the omitted rate for old gravel streets and the additional for clay excavation, and the extra work performed under the verbal agreement of the Commissioners of said District as aforesaid, which work was accepted by said Commissioners and the District received the benefit thereof, the claimant performed the following work:

North Carolina Avenue—Contract No. 264.

1.	2,318 lin. ft. 12-inch gutter flag laid, at 35c	$811.30
2.	533 lin. ft. 16-inch gutter flag laid, at 48c	255.84
3.	17.7 ft. 5-inch granite curb laid, at $2.05	36.28
4.	14.1 ft. 5-inch circular curb, Gleason pattern, at $2.05	28.90
5.	64 cubic yards sewer excavation, at 40c	25.60
6.	90 ft. 12-inch pipe laid, at 88c.	79.20
7.	1 trap	157.58
8.	3,972.34 square yards graveling, at 15c	595.85
9.	3,008.92 square yards brick pavement, at $1	3,008.92
10.	1,376 square yards cobble pavement, at 70c.	963.20
11.	1,210 ft. 16-inch flagging for crossings laid, at 60c	726.00
12.	1,889.3 ft. 5-inch new curb and setting, at $1.20	2,267.16
13.	32,793 cub. yards excavation, per meas. Aug. 9, 1872, at 30c. to established grade	9,837.90
14.	Haul on same, at ½c. per 100 ft., 1,100 ft., at 5½c	1,803.61

15. 20,438 cub. yards excavation, per meas. Mar. 27, 1875, at 30c., between Coyle grade and new grade..	6,131.40
16. 3,854 cub. yds. haul 300 ft., at 1¼c. per 100 ft., at 3¾c..	144.52
17. 16,584 cub. yds. haul 1,100 ft., at 13¾c., at 1¼c. per 100 ft.	2,280.30
18. 10,585.6 cub. yds. excavation, per meas. Dec. 2, 1875, at 30c. per cub. yd., between Coyle grade and new grade	3,175.68
19. Haul on 10,585.6 cub. yds., 1,550 ft., at .1937c., at 1¼c. per 100 ft.	2,050.43
20. 33,550 cub. yds. excavation, per meas. Jan 22, 1876, at 30c. per cub. yd., between Coyle grade and new grade	10,065.00
21. Haul on 33,550 cub. yds., 1,550 ft., at .1937c., at 1¼c. per 100 ft.	6,498.63
22. 775.5 lin. ft. 5-inch curb, at $1.20	930.60
23. 1,077.78 square yds. brick pavement, at $1.00	1,077.78
24. 2,160 square yards graveling, at 15c	324.00
25. 750 ft. blind drain, at $1.00	750.00
26. Additional stiff clay excavation, 23,704 cub. yds., at 30c. (done after 1874)	7,111.20
27. Excavation under sidewalks, viz., 10 inches depth under 4,086.70 sq. yds. brick pavement, 1,135.19 cub. yds., at 30c	340.55
2,044.11 cub. yds. excavation under carriageway, 12 inches depth, under 6,132.34 sq. yds. graveling, at 30c	613.23
Haul on above 3,179.30 cub. yds., 1,550 ft., at .1937c..	615.83
Total	62,706.49

The excavation, as well as the rate of 1¼ cents per haul therefor mentioned in items 15 to 21, both inclusive, and item 27 were for work done under the verbal agreement with the Commissioners of said District as aforesaid, as was also the additional or clay excavation mentioned in item 26. The excavation mentioned in item 27 is not included in either of the measurements mentioned in items 13, 15, 18 or 20.

D Street S. E.—Contract No. 264.

1. 4,667.11 sq. yds brick pavement laid at $1	$4,667.11
2. 5,219 cub. yds. excavation, at 40c., meas. of Dec. 14, 1876, between 2d and 6th Sts.	2,087.60
3. 19,471 cub. yds. excavation, at 30c. meas. of Dec. 4, 1876, between 2d and 6th Sts.	5,841.30
4. Haul of 2,238 cub. yds. excavation between original surface and established grade, 2,358 feet, at ½c. per 100 feet, .1179c	263.86

5. Haul of 20,752 cub. yds. excavation between established grade and new grade, 2,358 feet, at 1¼c. per 100 feet, .2947c., as per agreement with Commissioners	6,115.61
6. 1,345 sq. yds. sodding at 50c	672.50
7. 4,266.45 lin. ft. 5″ b. s. curb and setting at $1.20	5,119.74
8. 435 lin. ft. 6″ granite curb and setting, at $1.42	617.70
9. 41.4 lin. ft. granite cir. curb and setting, at $2.05	84.87
10. 932.4 sq. yds. cobblestone pavement, laid at 70c	652.68
11. 3,735.6 sq. yds. graveling, at 15c	560.34
12. — ft. g. granite corners, at $2.05	67.44
13. 1,133 lin. ft. 12″ sewer and laying at 88c	997.04
14. 274 lin. ft. 15″ sewer and laying, at $1.33	364.42
15. 819 lin. ft. 6″ sewer and laying, at 36c	294.84
16. 111 lin. ft. 12″ by 6″ connections, at $1.38	153.18
17. 30 lin. ft. 15″ by 6″ connections, at $1.80	54.00
18. 2 manholes 6′ to 8′ deep, at $42.24	84.48
19. 5 manholes 8′ to 10′ deep, at $52.80	264.00
20. 4 manholes 10′ to 12′ deep, at $63.36	253.44
21. 1 receiving basin, new pattern	157.58
22. 2 receiving basins	315.16
2 receiving basins, old pattern, reset, at $37.00	74.00
23. 1,450.50 cub. yds. excavation, at 40c., under extension	580.20
24. 90 lin. ft. 12″ sewer and laying, at 88c	79.20
25. 70.5 cub. yds. excavation, at 40c. under extension	28.20
26. 2,561 ft. 12″ gutter flag laid, at 35c	896.35
27. 456 ft. 16″ bridging, at 60c	273.60
	31,620.44

The total excavation, according to the final measurement, was ... 24,690 cub. yds.

On 1,700 cub. yds. no haul was allowed, presumably because it was hauled less than 200 feet..... 22,990—2,358 ft.
1,700—no haul.

24,690

E Street S. E.—No Change.

E Street—Contract No. 264.

1. 4,981.88 cub. yds. grading, at 40c	$1,992.75
2. 24,229.62 cub. yds. grading, at 30c	7,268.89
3. 24,824.40 cub. yds. haul 1,134 ft. over 200 ft., at 1¼c	3,517.62
4. 4,387.10 cub. yds. haul 2,800 ft. over 200 ft., at 1¼c	1,535.48
5. 1,602.22 sq. yds. brick pavement laid, at $1.00	1,602.22
6. 37 sq. yds. cobblestone pavement laid, at 70c	25.90
7. 1,227 lin. ft. 5″ b. s. curb and setting, at $1.20	1,472.40

8. 14.1 lin. ft. granite cir. curb and setting, at $2.05.....	28.91
9. 24 running ft. gutter flag laid, at 35c.....	8.40
10. 136 running ft. gutter flag laid, at 48c.....	65.28
11. 2,114 cub. yds. grading, at 30c.....	634.20
12. 2,114 cub. yds. haul 2,626 ft. over 200 ft. at 1¼c.....	693.81
13. Sewer work on E, viz:	
14. 104 lin. ft. 12″ sewer pipe, at 88c.....	91.52
15. 48 lin. ft. 6″ sewer pipe, at 36c.....	17.28
16. 6 lin. ft. 12″ x 6″ connections, at $1.38.....	8.28
17. 1 manhole 7′ deep.....	42.24
18. 83.6 cub. yds. excavation, at 40c.....	33.44
	19,038.62

X.

On July 23, 1872, the Board of Public Works awarded to the claimant another contract, designated as contract No. 413, in these words:

"*Contract No.* 413.

This contract, made and concluded this twenty-third day of July, in the year one thousand eight hundred and seventy-two, by and between . . . the Board of Public Works of the District of Columbia, of the first part, and Elias E. Barnes, of Washington, D. C., of the second part, witnesseth:

"First, that the said party of the second part has agreed, and by these presents doth agree, with the said party of the first part, for the consideration hereinafter mentioned and contained, and under the penalty expressed in a bond bearing even date with these presents, and hereunto annexed, to furnish, at his own proper cost and expense, all the necessary materials and labor, and, in a good, firm, and substantial manner to grade, set the curbstones, and lay and put down the brick foot pavements on Second street east, between Maryland and Virginia avenues; on Third street east, between Maryland and Virginia avenues, and on Fourth street east, between Maryland and Virginia avenues, and on Fourth street east, between Maryland and Pennsylvania avenues, in the city of Washington, D. C. Also to construct a fifteen (15) inch pipe sewer on the west side of said Second street east, between East Capitol street and Pennsylvania avenue, with the necessary manholes and traps; the work of said grading, curbing, brick paving, and sewering to be done and completed in accordance with the specifications following, to-wit:

* * * * * * *

"Sixth and eighth. (Same as sixth and eighth in contract No. 264.)

* * * * * * *

"Tenth. It is further agreed that the said party of the second part shall receive the following prices as full compensation for furnishing all the materials and labor which may be required in the prosecution of the whole of the work to be done under this agreement, and in all respects completing the same, to wit:

"Grading thirty (30) cents per cubic yards; including the first two hundred (200) feet of hauling.

"For every additional two hundred (200) feet of hauling per cubic yard, one (1) cent.

"Setting curbstones (new 8″) per lin. ft., forty (40) cents
" " (new 6″) " " " thirty (30) cents
" " (new 5″) " " " twenty-five (25) cents
"Resetting " (old 4″) " " " fifteen (15) cents
"Laying brick pavement, new, per sq. yd. eighty (80) cents
"Relaying brick pavement, old, per sq. yd. twenty-five (25) cents
"Provided, that bricks shall be furnished by the board at a price not exceeding eleven dollars and fifty ($11.50) cents per thousand.
"Fifteen (15″) inch pipe per lin. ft., $1.33.
"Six (6″) inch pipe " " " thirty six (36) cents.

Manholes:

6 feet deep or under	$31.68
Over 6 feet deep and more than 8 feet	42.24
" 8 " " " " " 10 "	52.80
" 10 " " " " " 12 "	63.36
" 12 " "	73.92

Traps:

Old corporation patterns	145.38
Chase's pattern	114.58

"Which said sums or prices the said party of the first part shall pay to the said party of the second part, as herein provided.

"Eleventh. It is further agreed that the measurements shall be made by the engineer of the said party of the first part, or his assistants."

At the time said contract was awarded the contract clerk of said board notified the claimant in writing, about which there is no controversy, that said contract had been awarded to him at board rates, but the court finds that the evidence fails to show that the board awarded said contract at said rates, or at any other rates than those set forth in the contract aforesaid, or that any mistake was made in the omission therefrom of the rate for old gravel streets.

XI.

That subsequent to the execution of said contract No. 413 the claimant entered into other contracts with the Commissioners of said District, known as extensions thereof, in these words:

"*First Extension of Contract No.* 413.

"For and in consideration of the stipulations hereinafter contained it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 413 in the series of contracts made by the Board of Public Works of the District of Columbia be and the same is hereby extended with its various terms, conditions, and stipulations to embrace the following work, to wit:

"Grade 3d street east, between Virginia avenue and Eastern branch; N street south, between 2d and 4th streets east; M street south, between 2d and 4th streets east, and reset the curbs and relay the brick foot-pavements on said streets where ordered by the engineer of the D. C.

"It is further agreed that the said Elias E. Barnes shall receive the price established and paid by the Board of Public Works for work of similar character, provided payment shall be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value. * * *

"In witness whereof the Commissioners of the District of Columbia, successors to the Board of Public Works, appointed under the act of Congress entitled 'An act for the government of the District of Columbia, and for other purpose-,' approved June 20, 1874, and the party of the second part to these presents have hereunto set their hands and seals this 19th day of August, 1875."

"*Second Extension of Contract No.* 413.

"(Memorandum in red ink:) Cancelled so far as relates to cobblestone pavement on M St. south, bet. S. Cap. St. and 4½ street west, and bet. New Jersey Ave. and 4th street east. (See extension same No. 413.)

"For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 413, in the series of contracts made by the Board of Public Works of the District of Columbia, be, and the same is hereby, extended with its various terms, conditions, and stipulations to embrace the following work, to wit:

"Set the curbs and lay the brick sidewalks on M street south, between 2nd street west and 4th street east, according to specifications.

"Also grade, set the curbs, lay the brick pavements, and lay and put down the 12-inch pipe sewers where ordered on C street south, from 2nd street east to South Capitol street, according to specifications. All suitable old material to be replaced.

"Also lay cobblestone pavement on M street south, between 4½ street west and 4th street east.

"It is further agreed that the work specified to be done under this agreement shall be completed by the first day of November, 1875; and if not so completed by said date the party of the second part hereto shall forfeit all right and title to perform the work herein described.

"It is further agreed that the said Elias E. Barnes shall receive the prices established and paid by the Board of Public Works of the District of Columbia for work of similar character; provided that payment be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value. * * *

"In witness whereof the Commissioners of the District of Columbia, successors to the Board of Public Works, appointed under the act of Congress entitled 'An act for the government of the District of Columbia, and for other purpose-,' approved June 20, 1874, and the party of the second part to these presents have hereunto set their hands and seals this 19th day of August, 1875."

"*Third Extension of Contract No.* 413.

"For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes that contract No. 413, in the series of contracts made by the Board of Public Works of the District of Columbia, be, and the same is hereby, extended with its various terms, conditions and stipulations, to embrace the following work according to specifications hereunto annexed, to wit:

"Lay and put down Belgian granite block pavement on the carriage-way of 3d street east, between D street south and Virginia avenue, and the blue-rock pavement on 3d street east, between Virginia avenue and N street south, and gravel the roadway of D street south, between New Jersey avenue and 6th street east; grade and relay the old material on C street south, between 2d and 3d streets east. Also grade, set the curbs, and lay brick pavements on D street south, between New Jersey avenue and South Capitol street.

"It is further agreed that the work specified herein shall be completed by the 30th day of November, 1875, under penalty of forfeiture of all right and title to perform the same.

"It is further agreed that the said Elias E. Barnes shall receive the prices established and paid by the Board of Public Works for work of similar character: Provided, that payment be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress, approved June 20, 1874, which bonds shall be accepted and received at their par value.

* * * * * * *

"In witness whereof the Commissioners of the District of Columbia, successors to the late Board of Public Works, appointed under the act of Congress entitled 'An act for the government of the District of Columbia, and for other purposes,' approved June 20, 1874, and the party of the second part to these presents has hereunto set his hand and seal this 12th day of Nov., 1875.

"*Fourth Extension of Contract No.* 413.

"For and in consideration of the stipulations hereinafter contained, it is agreed by and between the Commissioners of the District of Columbia and Elias E. Barnes, that contract No. 413, in the series of contracts made by the Board of Public Works of the District of Columbia be, and the same is hereby extended, with its various terms, conditions, and stipulations, to embrace the following work, to wit:

"Lay and put down blue-stone pavement on the carriage way of M street, south, between South Capitol street and 4½ street west, and between New Jersey avenue and Fourth street east, (this work is in lieu of cobblestone pavement on said street between the points named).

"It is further agreed that the work herein specified shall be completed by the 30th day of December, 1875, under penalty of forfeiture of all right and title to perform the same.

"It is further agreed that the said Elias E. Barnes shall receive the prices established and paid by the Board of Public Works for work of similar character: Provided, that payment be made in the bonds issued by the sinking fund commissioners of the District of Columbia under and by virtue of section 7 of the act of Congress approved June 20, 1874, which bonds shall be accepted and received at their par value.

* * * * * * *

"In witness whereof the Commissioners of the District of Columbia, successors to the late Board of Public Works, etc., etc."

XII.

Under said contract 413 and the several extensions thereof set forth in the preceding finding, the claimant performed the following work on C street southeast and M street southwest at the prices hereinafter named,—that is to say:

C Street S. E.—Contract 413.

1.	2,847.40 sq. yds. brick pavement laid, at $1.....	$2,847.40
2.	8.33 sq. yds. old brick pavement relaid, at 25c.....	2.08
3.	865.67 sq. yds. cobblestone pavement laid, at 70c.....	605.96
4.	2,141 lin. ft. 5″ b. s. curb and setting, at $1.20.....	2,569.20

5.	34.5 lin. ft. 5″ curb reset, at 25c	8.62
6.	10.5 lin. ft. 6″ curb reset, at 30c	3.15
7.	21.35 lin. ft. 6″ granite cir. curb and setting, at $2.05	43.77
8.	6.25 lin. ft. 6″ granite cir. curb reset, at 30c	1.87
9.	2,191 running ft. 12″ gutter flag laid, at 35c	766.85
10.	207 running ft. 16″ gutter flag laid, at 48c	99.36
11.	2,848.6 cub. yds. grading, at 40c	1,139.44
12.	4,469.6 cub. yds. grading, at 30c	1,340.88
13.	7,318.2 cub. yds. haul, 1,220 ft. over 200 ft., at 1¼c. = 0.1525	1,116.02
14.	3,060 sq. ft. graveling, per yd. 15c	459.00
15.	1,326 ft. b. s. curb. redressed, at 20c	265.20
16.	Sewer work, Second to Third St., viz:	
	298 lin. ft. 12″ sewer pipe and laying at 88c	262.24
	21 lin. ft. 6″ sewer pipe and laying, at 36c	7.56
	30 lin. ft. 12″ x 6″ connection pipe and laying, at $1.38	41.40
	3 manholes 10′ to 12′ deep, at $63.36	190.08
	310.72 cub. yds. of excavation, at 40c	124.29
		11,894.37

M Street S. W.—Contract 413.

1.	3,406 sq. ft. 16-in. crossing laid, at 60c	$2,043.60
2.	6,747.10 sq. yds. brick pavement laid at $1	6,747.10
3.	5,723.78 sq. yds. cobblestone pavement laid, at 70c	4,006.64
4.	6,401 lin. ft. 5″ b. s. curb and setting, at $1.20	7,681.20
5.	65.8 lin. ft. granite cir. curb, Gleason pattern, at $2.05	134.89
6.	101 lin. ft. granite cir. curb and setting, at $2.05	207.05
7.	6,025 running ft. 12″ gutter flag laid, at 35c	2,108.75
8.	1,481 running ft. 16-in new gutter flag laid, at 48c	710.88
9.	19,849 cub. yds. grading, at 30c	5,954.70
10.	9,867 cub. yds. grading, at 40c	3,946.80
11.	29,716 cub. yds. haul 736 ft. over 200 ft., at .092	2,733.87
12.	6,973.23 sq. yds. blue rock pavement laid, at $1.75 per yd	12,203.15
13.	4,097 cub. yds. grading, at 30c	1,229.10
14.	4,097 cub. yds. extra haul, at 1¼c	376.92
		50,084.65

XIII.

At the time of the award of said contract 413 the established grade of Third street between Pennsylvania avenue and Virginia avenue required the excavation of 7,078 cubic yards of earth, which was completed in 1873.

That by reason of the change of grade of North Carolina avenue by the Commissioners in 1874, as hereinbefore set forth, it became necessary to further grade Third street to conform to the new grade

so established; and under the terms of said contract 413 and the extensions thereof, and by the direction of said Commissioners, and with the agreement and understanding that said Commissioners would pay him the board rates for the extra excavation and for the haul in 3.65 per cent. bonds of said District, as set forth in finding 5, the claimant performed the following work on Third street, to wit:

Third Street—Contract 413.

1.	5,030.5 sq. yds. Belgian pavement laid, at $3.50.....	$17,606.75
2.	See item 4.	
3.	198.8 sq. yds. cobblestone, at 70c.....	139.16
4.	747.4 sq. ft. flag crossing, at 60c.....	448.44
5.	122 running ft. 12″ gutter flag, at 35c.....	42.70
6.	1,956 cub. yds. grading, at 30c.....	586.80
7.	1,000 cubic yds. haul, 2,900 ft. over 200 ft., at 1¼c. per 100 ft.....	362.50
8.	1,802 cub. yds. grading, at 30c.....	540.60
9.	3,734 cubic yds. grading, at 40c.....	1,493.60
10.	5,536 cubic yds. haul, 1,412 ft. over 200 —, at 1¼c...	977.10
11.	Lowering and repairs of water mains.....	399.30
12.	4,521.82 sq. yds. brick pavement laid, at $1.....	4,521.82
13.	2,815 running ft. 5″ b. s. curb and setting, at $1.20...	3,378.00
14.	713 running ft. 6″ b. s. curb and setting, at $1.42.....	1,012.46
15.	4 running ft. 6″ granite circular curb set, at $1.42...	5.68
16.	18.6 running ft. 6″ granite circular curb reset, at 30c.....	5.58
17.	32.3 running ft. 6″ granite circular curb set, at $2.05..	66.20
18.	3 running ft. 6″ b. s. circular curb set, at $2.05.....	6.15
19.	6.75 running ft. 4″ b. s. circular curb set, at $2.05.....	13.83
20.	288 running ft. 5″ b. s. circular curb reset, at 25c...	72.00
21.	22,248.83 cub. yds. excavation, at 30c.....	6,674.64
22.	7,078 cubic yds. excavation, at 30c.....	2,123.40
23.	7,078 cubic yds. haul, 1,655 ft. over 200 ft., at ½c. .0827c.....	585.35
24.	22,248.83 cubic yds. haul, 1,655 ft. over 200 ft., at 1¼c., .2068c.....	4,601.05
25.	918.13 sq. yds. sodding, at 50c.....	459.06
26.	1,219 lin. ft. 15″ pipe and laying, at $1.33.....	1,621.27
27.	3 manholes, 8′–10′ deep, at $52.80.....	158.40
28.	9 manholes, 10′–12′ deep, at $63.36	570.24
29.	2 manholes, 12′–14′ deep, at $73.92	147.84
30.	2 manholes, 14′–16′ deep, at $84.48.....	168.96
31.	1 manhole, 16′–18′ deep	95.04
32.	Additional on 1,630.14 cubic yds. excavation over 16 ft. deep.....	233.15
33.	8 receiving basins, at $138.80	1,110.40
34.	2 receiving basins and traps, at $145.38	290.76
35.	1,103 lin. ft. 36″ sewer, 168,851 bricks, at $23 per M..	3,883.57

36. 4,555.54 cubic yds. excavation, at 40c	1,822.21
37. 159 lin. ft. 12″ gutter flag, at 88c	139.92
38. 9 lin. ft. 18″ gutter flag, at $1.62	14.58
39. 609 lin. ft. 6″ gutter flag, at 36c	219.24
40. 34 lin. ft. 15 x 6 connections, at $1.80	61.20
Total	56,658.95

The excavation and haul mentioned in items 21 and 24 were for work done in 1874 and thereafter under the direction and verbal agreement of the Commissioners of said District as aforesaid, which work was accepted by said Commissioners and the District received the benefit thereof.

XIV.

The claimant also did the following work by order of the Board of Public Works, but not under written contract, admitted by defendant to be correct and of which defendant received the full benefit:

441.33 sq. yds. brick pavement laid, at $1	$441.33
301.5 lin. ft. 5″ b. s. curb, at $1.20	361.80
119 cub. yds. grading, at 30c	35.70
119 cub. yds. hauled 1,320 ft. over 200 ft. at 16½c	19.63
3 lin. ft. 15″ pipe and laying, at $1.33	3.99
24 lin. ft. 6″ pipe and laying, at 36c	8.64
3 lin. ft. 18″ pipe, and laying, at $1.62	4.86
2 manholes 10′–12′ deep, at $63.36	126.72
1 manhole 18′–20′ deep	105.60
462.9 lin. ft. 36″ brick sewer, 80,081.7 brick, at $23 per M.	1,841.88
2,009.39 cub. yds. excavation, at 40c	803.75
Additional for 955.57 cub. yds. excavation over 16 ft. deep, at 37c	353.56
9 yds. hauled, at 1½c	19.63
9 yds. hauled, at ½c	7.85
	4,134.94

XV.

Said Barnes also, in pursuance of his several contracts with the defendants and the several extensions thereof, dressed and joined old curb to amount in value, at regular prices, of $2,643.48, as stated in the first paragraph of his amended petition filed and allowed April 14, 1887. Conceded by defendant.

XVI.

The claimant has received payments on account of the work herein elsewhere mentioned aggregating	$178,949.57
And materials the value of	22,748.11
Also sand of the value conceded	350.00
	202,047.68

XVII.

Counterclaim.

1. Under said contract 413, for work done after January 1, 1873, but prior to the extra work performed under the verbal agreement between the claimant and the Commissioners of said District as set forth in finding 13, on that part of Second street between Pennsylvania and Maryland avenues included in the original written contract, but not in any extensions thereof, partial measurements were made by the engineer and certified to the auditor, and in the certificate were the following quoted items, among others:

"5,539 cubic yds. grading, 30c. per yard;
"9,886 cubic yds. excavation hauled 2,300 feet over 200 ft., at 1 ct. per yard per 200 feet over 200 feet,"

which was the written contract rate.

Partial payment was made by the Board of Public Works in accordance therewith September, 1873.

On final measurement the board of audit restated the whole account March 19, 1875; allowed 40 cents a yard for said grading, which exceeded the amount at written contract rates by $553, and allowed 1¼ cents per yard for said haul per 100 feet over 200 feet, which exceeded the amount at written contract rates by $1,705.33, and payment was made accordingly.

2. Under said contract 413, said Barnes, after January 1, 1873, but before the verbal agreement between him and the Commissioners for the extra work set forth in said finding 13, did other work on Second street, between Pennsylvania and Virginia avenues, included in said original contract and not in any extension thereof. In the certificate of final measurement, made January 9, 1874, the following, among others, appeared:

"8,400 cubic yds. grading, 40 cts., which in amount exceeded that at written contract rates in the sum of $840;
"19,566 cubic yds. excavation hauled 2,400 feet over 200 ft., 1¼ cts. per yard per 100 ft. over 200 ft.;"

which in amount exceeded that at written contract rates by the sum of $3,521.88, and partial payments were made by the Board of Public Works.

Subsequently, March 19, 1875, the board of audit, after deducting the partial payments referred to, made final payment of the balance in accordance with said statement.

3. Under said contract 413, said Barnes, after January 1, 1873, and prior to the verbal agreement between him and the Commissioners, set forth in said finding 13, did other work on Third street, between Pennsylvania and Maryland avenues, included in the orig-

inal contract, but not in any extension thereof. Final measurement and certificates were made and paid October 8, 1873, by the Board of Public Works, in which the following quoted items appear, among others:

"7,010 cubic yds. grading 40 cts. per yard,"

which in amount exceeded that at written contract rates by the sum of $701;

"15,141 cubic yds. excavation, hauled 2,400 cubic yards, 1¼ cts. per yard per 100 ft. over 200 ft.,"

which in amount exceeded that at original written contract rates by the sum of $2,725.38.

4. Under said original contract 413 said Barnes, after January 1, 1873, and before the verbal agreement for the extra work between him and the Commissioners as set forth in said finding 13, did other work on Fourth street east, between Pennsylvania and Maryland avenues, included in the original written contract and not in any extension thereof. Final remeasurement was made and certified October 10, 1873, and the full amount paid in accordance therewith by the Board of Public Works November 12, 1873, in which the following items appear:

"7,000 cubic yds. grading, 40 cts. per yard,"

which in amount exceeded that at written contract rates by the sum of $700;

"10,192 cubic yds. hauled 3,000 feet over 200 feet, 1¼ cents per yard per 100 ft. over 200 ft.,"

which in amount exceeded that at written contract rates by the sum of $2,293.20

XVIII.

Assignments.

November 17, 1877, said Barnes assigned to Samuel J. Ritchie $6,000 of what might be due from the District to said Barnes, and June 28, 1878, he assigned the further sum of $5,000, and January 16, 1879, the further sum of $1,000, aggregating $12,000, as conceded by the parties without controversy.

Conclusions of Law.

Upon the foregoing findings of fact the court decide as conclusions of law:

1. That contract 264 be and the same is hereby reformed so as to incorporate therein the rate of 40 cents per cubic yard for old

gravel streets to a depth of 2 feet to conform to the intention of the parties as set forth in finding 2.

2. That by reason of the facts set forth in finding 10 the claimant is not entitled to a reformation of contract 413 in respect to said rate for old gravel streets.

3. That the claimant is entitled to be allowed on findings 9, 12, 13, 14 and 15 the sum of $238,781.94, less the sum of $202,047.68 heretofore paid said claimant, leaving a balance in his favor of $36,734.26.

4. The defendants must be allowed for the overpayments above those agreed upon in the written contracts as stated in finding 17 the sum of $13,039.79.

5. On the whole case, after deducting the one from the other sum, the claimant is entitled to judgment against the defendants for the difference, being $23,694.47, due and payable March 1, 1876, of which sum there shall be paid to said Samuel J. Ritchie, assignee as aforesaid, as agreed by said claimant, and which is hereby ordered, the sum of $12,000.

(Record, page 51.)

XIV.—*Judgment of the Court, Entered March* 31, 1902.

ELIAS E. BARNES
vs.
THE DISTRICT OF COLUMBIA.

At a Court of Claims held in the city of Washington, on the 31st day of March, 1902, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimant, and do order, adjudge and decree that the said Elias E. Barnes do have and recover in the manner provided by the act of June 16, 1880, chapter two hundred and fifty-three, the sum of twenty-three thousand six hundred and ninety-four 47/100 dollars ($23,694.47) upon debts of the District of Columbia due and payable March 1, 1876 within the meaning of the sixth section of the said act; twelve thousand dollars ($12,000) of said sum are to be paid to Samuel J. Ritchie assignee of said Barnes.

BY THE COURT.

(Record, page 51.)

XV.—*Defendant's Application for and Allowance of Appeal.*

From the judgment rendered in the above-entitled cause, on the 31st day of March, 1902 in favor of the claimant, the defendant, by its Attorney General on the 22nd day of April, 1902, makes applica-

tion for, and gives notice of an appeal to the Supreme Court of the United States.

L. A. PRADT,
Ass't Attorney General.
ROBERT A. HOWARD,
Special Assistant Attorney.

Filed April 22, 1902.
Allowed June 26, 1902 in open court.

LAWRENCE WELDON,
Presiding Judge.

(Record, page 52.)

XVI. Mandate of the Supreme Court of the United States dismissing the appeal for want of jurisdiction filed in the Court of Claims January 12, 1903.

A mandate of the Supreme Court of the United States dated January 8, 1903 in the above-entitled cause was filed in the Court of Claims January 12, 1903, in which it is ordered that

"Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and two, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and on a motion to dismiss, which was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court that this appeal be, and the same is hereby dismissed for the want of jurisdiction. December 8, 1902."

(Record, page 53.)

Motion of Defendant for Appeal under the Act of March 3, 1903.

Filed May 11, 1903.

ELIAS E. BARNES
v.
THE DISTRICT OF COLUMBIA. } No. 47, D. C.

Motion for allowance of appeal, provided for by the act of March 3, 1903.

Petitioner states that from the judgment rendered in this case on March 31st, 1902, an appeal was allowed by this court to the Supreme Court: that on filing the transcript in the Supreme Court, the claimant interposed a motion to dismiss the appeal for want of jurisdiction in the court to entertain the same. This motion was

based upon the following provision of law, embraced in the act of June 6, 1900, (c. 789, 31 St. L. 572):

Defending suits in claims.—For defending suits in the United States Court of Claims, two thousand dollars: *Provided, that no judgment heretofore or hereafter rendered under the act of June sixteenth, eighteen hundred and eighty*, entitled 'An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes,' *shall be paid by the Secretary of the Treasury until said judgment shall have been reported to, and specific authority for payment thereof granted by Congress.*

This motion was allowed and the appeal dismissed.

Subsequently, the following provision was enacted, in "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, nineteen hundred and three, and for prior years, and for other purposes."

(C. 1006, St. 2d Sess. 57th Cong. 1031, 1070.)

For the payment of the judgments except the judgment in favor of Elias E. Barnes, rendered by the Court of Claims, reported to Congress at its present session in House document numbered 360 and Senate documents numbered one hundred and eighty-seven and two hundred, two hundred and ninety thousand three hundred and fifty-four dollars and forty-nine cents: Provided, that none of the judgments herein provided for shall be paid until the right of appeal shall have expired: And provided further, that the proviso contained in the act approved the sixth day of June, anno Domini nineteen hundred, entitled "An act making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes," which reads as follows: Provided, that no judgment heretofore or hereafter rendered under the act of June sixteenth, eighteen hundred and eighty, entitled "An act to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the Court of Claims to hear the same, and for other purposes," shall be paid by the Secretary of the Treasury until said judgment shall have been reported to, and specific authority for payment thereof granted by Congress, be, and the same is hereby repealed: and from all final judgments or decrees heretofore rendered in suits of the character of those mentioned in said proviso an appeal shall be allowed to the Supreme Court of the United States at any time within ninety days after the passage of this act, except in cases where the amounts found due by said court have been paid at the Treasury.

And your petitioner states that this judgment in favor of Elias E. Barnes is the judgment hereinbefore recited and that the same has not been paid at the Treasury.

Wherefore, comes petitioner, on this 11th day of May, 1903, a day within ninety days after the passage of the afore-mentioned act of

March 3, 1903, and prays this honorable court, that the allowance of an appeal, from the judgment rendered herein on March 31, 1902, be granted to the defendant.

L. A. PRADT,
Assistant Attorney General.

ROBERT A. HOWARD,
U. S. Special Attorney.

Filed May 11, 1903 and ordered to the law calendar.

October 26, 1903.—Ordered that the appeal be allowed as prayed for.

BY THE COURT.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 143.

THE DISTRICT OF COLUMBIA, APPELLANT,

v.

ELIAS E. BARNES.

CERTIFIED COPY OF DOCKET ENTRIES IN THE COURT OF CLAIMS.

FILED NOVEMBER 21, 1903.

(19135)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

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a D. C. 47.

Copy of docket entries. F. H. W.

1 ELIAS E. BARNES
v.
THE DISTRICT OF COLUMBIA. } No. 47.

Aug. 4, 1880.	Orig. petition filed. Atty. Gen. notified. Testimony ordered. Printed petition filed; 5 to Atty. General. Call on Commissioners issued.
Aug. 31, 1880.	Call on Commrs. D. C. returned & atty. notified.
Sept. 6, "	Traverse filed & atty. notified.
" 28, "	Call on Commrs. D. C. reissued.
Nov. 20, "	Petition of Saml. J. Ritchie to intervene filed and claimant and defts. notified by Shellabarger and Wilson. Filed by leave of judge at chambers.
Nov. 26, "	Printed petition of S. J. Ritchie recd. & five to Atty. Genl.
Dec. 10, "	Traverse filed and atty. notified.
Jany. 11, 1881.	Answer of claimant to petition of S. J. Ritchie filed and parties notified.
Feb. 12, 1881.	Reply of Commrs. of D. C. filed transmitting 1st contracts B. P. W. Nos. 264, 413, and 843—three extensions of 264 and four extensions of No. 413. 2d, B. P. W. vouchers Nos. 3623, 2836, of 1872; 1006, 2943–4, 3276–8, 3733–45, of 1873; 303 of 1874. Board of audit claims, class 4, Nos. 441, 1281, 1471, 1500, 1593, 1622, 1961, 2003, 2021, 2041, 2109, 2123, 2270, 2280, 2428, 2493, 2502, 2507, 2524, 2568, & 2571. Engineers' accounts, 1171, 1192, 1200, 1201, 1216, 1230, & copy of 1324.

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3d, disallowed claims, class 4, No. 765 (papers numbered in red ink from one to forty-six, inclusive), and parties notified.

Feb. 17, 1881. Printed copies of answer of claimant E. E. Barnes to petition of S. J. Ritchie rec'd, & five to Asst. Atty. Gen.

April 7, 1881. Motion to substitute R. B. Mitchell as atty. of record (S. M. Wilcox consenting) filed & defts. notified. (Motion allowed.)

April 13, 1881. Motion of Asst. Atty. Gen'l for leave to withdraw papers returned by Commrs. filed & allowed & papers receipted for and withdrawn by J. C. Fay, esq., for deft.

April 19, 1881. Depositions of M. Marceron, J. Fitzpatrick, W. Beron, J. Gray, P. Maloney, A. Gleason, W. C. Murdock, G. Neitzy, S. N. Hilton, W. Hussey, C. Nice, J. Alman, E. E. Barnes, & C. A. Appel, for claimant, filed & parties notified.

July 7, 1881. Case entered on notice book by clm't.

August 1, " Depns. Geo. H. Bailey & others filed for defendants, and Exhibit G. H. B. Atty. notified.

Sept. 20, 1881. Motion for leave to file amended petition & bill of particulars filed by claimant & allowed.

" " " Amended petitions & copies filed & five to defts.

Nov. 29, 1881. Deposition of J. A. Osborne for defts. filed and parties notified.

Jan'y 26, 1882. Plea of set-off filed & atty. notified.

Feb. 10, 1882. Declaration of claimant suggesting death R. B. Mitchell, esq., his atty. of record, and substituting H. E. Paine, atty. of record.

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Feb. 10, 1882. H. E. Paine, esq., as his atty., and defts. notified.

Feb. 21, 1882. Replication to plea of set-off filed and defts. notified.

Depositions of S. McMahon, P. Cullinane, J. A. De Wandalier, H. J. McLaughlin, D. Nalley, J. T. Ballenger, H. Hurt, S. Cook, T. McCaffrey, and E. E. Barnes, for claimant, filed and parties notified.

Mch. 6, 1882. Request of H. E. Paine, esq., to withdraw as atty. of record filed & defts. notified.

" 6, 1882. Motion of claimant to appoint Reginald Fendall, esq., atty. of record in place of H. E. Paine, esq., filed & defts notified. Allowed.

Reginald Fendall, atty. of record.

March 8, 1882. Printed copies of replication of Feb. 10, 1882, rec'd and five to defts.

April 1, 1882. Papers withdrawn April 13, 1881, returned by defts. p. J. C. Fay, esq.

April 5, 1882. Call on Commrs. D. C. issued.

" 10, " Reply of Commrs. D. C. to call of April 5, 1882, transmitting contracts Nos. 28 and 36 (two papers) & parties notified.

May 4, 1882. Continued.

Mch. 17, 1883. Motion for reference to Engineer Commr. to make certain computations and measurements filed by clmt. and referred to law docket.

" 17, " Call on Commrs. D. C. issued.

Mch. 19, " Motion of March 17, 1883, argued & submitted.

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Mch. 22, 1883. Motion to substitute J. W. and G. L. Douglass attys. of record (former atty. consenting) filed & deft. notified. Allowed.

J. W. & G. L. Douglass, attys. of record.

Mch. 22, 1883. Power of atty. filed.

Mch. 31, 1883. Reply of Commrs. D. C. filed transmitting auditor's vouchers B. P. W. Nos. 3116, 3311, 3355, of 1872; No. 563, of 1873. Board of audit claim, class 4, No. 2348 (five papers). Parties notified.

Mch. 31, 1883. Motion for leave to file amended petition filed and defts. notified. Allowed.

Mch. 31, 1883. Amended petition filed.

April 2, " Motion to refer case to referee filed and referred to law docket. Defts. notified.

April 3, 1883. Motion for leave to amend petition filed. Defts. notified. Allowed.

" 5, " Printed copies of amended petition rec'd, and five to defts.

April 9, 1883. Referred to A. A. Hosmer, esq., to take & state account, &c. (See Journal 6, page 221.)

April 21, 1883. Motion for leave to withdraw certain original papers filed by defts. and allowed, and papers taken and receipted for by Mr. Fay.

April 26, 1883. Depositions of Wm. Hussey, S. D. Charles, E. E. Barnes, and S. L. Phelps, for claimant, filed and parties notified.

April 26, " Receipt of A. A. Hosmer as referee for depns. filed Apr. 26, 1883, filed. Returned June 19, 1883.

May 1, 1883. Call on Commrs. D. C. issued.

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May 7, 1883. Continued.

Nov. 2, " Depns. of Rock & Hoxie filed for deft. Parties notified.

Mch. 20, 1884. Reply of Commrs. D. C. filed transmitting receipts of E. E. Barnes, Nos. 1446, 1447, 1737, 1738, 1771, 2086, 2098 of 1872; Nos. 1446, 1771, 2260, 2459, 2713, 3026, 3209, 3293, 3465 of 1873; Nos. 2210, 2854, 3190, 4545, and 5079 of 1874; Nos. 4308, 5035, 6205, 6306, 6494, 6791, 6889, 6921, 7204, 7238, 7322, 7375, 7528, 8419, 8918, 9093, and 11011 of 1875—(thirty-eight papers). Parties notified.

June 2, 1884. See Journal 6, page 419, for order for payment of referee.

Feb. 2, 1885. Receipt of A. A. Hosmer, esq., referee for certain papers filed.

May 5, 1885. Report of A. A. Hosmer, referee, filed with accompanying papers marked schedules Nos. 1 to 9, inclusive, and papers marked A. A. H. Nos. 10, 11, & 12, and sundry papers numbered in red ink from 1 to 95, inclusive, filed by referee. Parties notified.

May 25, 1885. See Journal 7, page 91, for order for payment of referee.
Oct. 30, 1885. Exceptions to report of referee by claimant filed, defts. notified.
Mch. 4, 1886. Request of defts. to withdraw papers filed allowed; receipted for.

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April 19, 1886. Depns. of E. Barnes, J. F. Acker & D. Donovan for clmt. filed. Parties notified.
May 17, 1886. Claimant's requests for facts filed; 5 to defts.
" 18, " Printed copies of claimant's exceptions to report recd.; 5 to defts.
" 18, " Claimant's brief on exceptions filed; 5 to defts.
" 20, " Two requests of defts. for papers filed; allowed; receipted for.
" 21, "
May 26, 1886, Exceptions to report of referee filed by defts.
May 26, 1886. Defts. brief on exceptions filed.
May 26, 1886. Argument of case begun.
" 27, 1886. Continued.
June 3, 1886. Papers withdrawn by defts. Mch. 4. '86, May 20 and 21, 1886, returned.
Nov. 29, 1886. Depns. of W. Forsyth, D. Donovan, and D. Warner for clmt. filed. Parties notified.
Jan'y 29, 1887. Request for all papers in this case filed by defts.; allowed; receipted for.
Mch. 22, 1887. Amended exceptions to report of referee filed by defts. in open court.
Mch. 22, 1887. Argument of case begun.
Mch. 29, 1887. Argument of case concluded and case submitted.
April 4, 1887. Motion of claimant for leave to file amendment to petition filed; defts. notified.
Oct. 31, 1887. Chief Justice read the opinion of the court. Judgment for defendants for $\$11{,}074.\frac{11}{100}$, and that the intervening petition of S. J. Ritchie be dismissed. Court filed findings of fact.

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Nov. 18, 1887. Motion for new trial filed by claimant; defts. notified.
Jan'y 25, 1888. Application of claimant for allowance of appeal filed in open court.
Aug. 8, 1893. Papers filed Feb. 12, 1881, April 10, 1882, March 31, 1883, & March 20, 1884; received & receipted for by W. Q. Roome, for Commrs. D. C. (See case No. 1.)
Mch. 28, 1895. Motion for new trial submitted.
April 1, 1895. Motion for new trial allowed.
May 14, 1895. Motion to refer case to John W. Anderson, referee, filed. Handed judges.
" 20, " Motion to refer to referee allowed. Oath of referee filed.

May 20, 1895. Motion of referee for leave to withdraw all papers filed; allowed. See his receipt endorsed on said motion.

Oct. 15, 1895. Papers returned by commr. or referee.

Oct. 15, 1895. Report of referee, J. W. Anderson, with Exhibits B & A filed. Parties notified.

Oct. 22, 1895. Motion of clm't atty. to confirm report of referee filed. To Law Calendar.

Oct. 29, " Exceptions to referee's report, by S. J. Ritchie, filed by Shellabarger & Wilson, his attys. Notice with copy to defts., also copy and notice to J. W. Douglass, esq., atty. for claimant.

Nov. 6, 1895. Mr. Fay, for claimants, filed in open court; stipulation

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of parties and motion that judgment be entered in accordance with said stipulation and the report of the referee.

Nov. 11, 1895. Conclusion of law filed by the court that claimant is entitled to the sum of $31,754.57 due, payable Jan'y 1, 1876, to be divided according to the stipulation of the parties Elias E. Barnes and Samuel J. Ritchie, and that judgment be and is hereby entered. To Elias E. Barnes $22,350.54, and to Samuel J. Ritchie $9,404.03.

Nov. 14, 1895. Attested transcript of judgment delivered to J. A. Douglass, esq., atty. of record.[a]

Feb'y 8, 1896. Application of defendants for appeal to Supreme Court of the United States filed. Atty. notified.

Mch. 23, 1896. Referees bill allowed for $300.

Mch. 24, 1896. Delivered to John W. Anderson a certified copy of the order of the court of March 23, 1896.

" 30, " Motion of claimant that court deny application of defendants for an appeal filed. Copy & notice to defts. handed judges. Order to be heard with the motion of defts.

Mch. 30, 1896. Assistant Atty. Gen'l Dodge moved in open court for the allowance of the appeal of the defendants, the consideration of which was postponed upon the suggestion of Mr. Douglass, atty. for clmt.

April 11, 1896. Defts. response to clmts. motion to deny application for appeal filed. Handed judges. Atty. notified.

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April 20, 1896. Defts. motion for new trial filed. Atty. notified. Handed judges. To law calendar.

April 29, " Defendants' motion for new trial and for allowance of appeal argued and submitted.

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[a] Across this paragraph in red ink: Mch. 4, 1900. This transcript was produced by Mr. Fay and cancelled as of Jna'y 18, 1876. J. Randolph, asst. clk.

May 18, 1896. Defts. motion for new trial allowed. (See order filed.)

May 21, 1896. Motion of clmt. to vacate order of court granting defts. a new trial filed. Copy. Notice to defts. Handed judges.

May 23, 1896. Defendants' exceptions to report of referee filed. Atty. notified.

May 25, 1896. Motion to vacate order granting defts. a new trial overruled.

Nov. 17, " Continued.

Jan'y 5, 1897. Papers formerly filed in this case numbered in red ink 1 to 5, 11 to 27, 29 to 46, 50½, 65 to 67, 69 to 71, 73 to 77, 79 to 93, 94, and 95, returned by Commrs. D. C. to the files in this case. Also Board of Audit, class 4, No. 441, received from Commrs. D. C. & filed. Parties notified.

Jan'y 6, 1897. Argument of case begun.

Jan'y 7, 1897. Argument of case closed, and case submitted.

Jan. 13, " Call on Commissioners D. C. allowed and issued.

Jan'y 16, 1897. Reply of Commrs. D. C. with Board of P. Works voucher No. 300 of 1874, 1480 of 1873, and 3654 of 1872, filed. Parties notified.

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Jan'y 21, 1897. Defts. printed brief of evidence filed. Atty. notified.

Nov. 5, 1897. Motion to remand case to general docket filed. Defts. consenting; allowed.

Mch. 14, 1898. Motion to refer case to referee filed; defts. notified. Handed judges.

April 5, 1898. Motion to refer to referee allowed. Case referred to Frank W. Hackett, esq., and referee notified.

Sept. 15, 1898. Depositions of F. H. Stier and W. H. H. Allen for claimant filed. Parties notified.

April 10, 1899. Call on Treasury Dept. filed; allowed; issued May 4, 1899.

May 12, 1899. Reply of Treasury Dept. filed. Parties notified.

June 23, 1899. Deposition of clmt. E. E. Barnes filed. Parties notified.

July 3, 1899. Three exhibits (Nos. 1, 2, & 3) to the depositions of E. E. Barnes filed. Parties notified.

Oct. 24, 1899. Call on Commissioners D. C. filed by claimant's atty. Handed judges.

Oct. 28, 1899. Above call allowed and issued.

Dec. 23, 1899. Reply of Commissioners D. C. (3 papers & 2 plots) filed. Parties notified.

Feb'y 6, 1900. Copy of request for return of certain papers (set out in accompanying receipt of Mr. Roome of Aug. 9, 1893), which request of the clerk was transmitted to the Commrs. D. C. per John C. Fay, esq., in a sealed packet. I. R. filed.

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Feb'y 19, 1900. The above receipt of Mr. Roome of Aug. 9, 1893, returned to the files by John C. Fay, esq., with an accompanying note.

July 18, 1900. Depositions of John F. Alexander, Elias E. Barnes for clmt. with accompanying Exhibits marked J. F. A., Nos. 1 to 10 & E. E. B., Nos. 1 to 5 filed. Parties notified.

Feb'y 5, 1901. Deposition of John F. Alexander for clmt. filed. Parties notified.

April 8, 1901. Clmt's request for findings of fact & brief filed; 5 copies & notice to defts.

May 14, 1901. Defendants' brief filed. Copy to J. W. Douglass, atty. of record.

May 16, 1901. Argued and submitted.

Oct. 9, 1901. Copy of letter to the Commissioners D. C. filed.

Nov. 4, 1901. Order filed remanding case for oral argument.

Dec. 5, 1901. Memoranda in response to memorandum of the court filed by clmt's atty.

Copies & notice to deft.

Dec. 12, 1901. Printed minute by the defts. of points ordered by the court for oral argument and explanation filed. Copies & notice to clmt's atty.

Dec. 19, 1901. Argument of case begun by Mr. Fay for the claimant.

Jan. 14, 1902. Further argument of case.

Jan. 15, 1902. Further argument of case.

Jan. 16, 1902. Call on Commissioners D. C. for temporary use of certain records of their office filed; allowed and issued.

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Jan. 16, 1902. Argument concluded & case submitted.

Jan. 16, 1902. Record books—two Journals Board of Public Works and one Ledger Board of Audit, received from Commrs. D. C. in response to call, and handed the court. These were returned to the said Commrs. Jan'y 17, 1902, per their messenger, J. E. Poole.

Mch. 11, 1902. Printed amended petition filed, with 25 printed copies; 5 copies & notice to defts.

Mch. 31, 1902. Court filed findings of fact and conclusions of law. Opinion by Peelle, J.

Judgment for claimant for $23,694.47, due and payable March 1, 1876.

April 22, 1902. Defts. application for an appeal filed. Attys. notified. Allowed June 26, 1902.

May 12, 1902. Order filed amending findings heretofore filed on the 31st of March, 1902.

June 4, 1902. Petition of defts. for amended & additional findings of fact, filed. Handed judges. Atty. notified.

June 23, 1902. Defts. motion for amended & additional findings overruled.

June 25, 1902. Application of and notice of appeal of clmt. from so much of judgment as allows counterclaim and refuses to reform contract 413 filed; defts. notified. Allowed July 17, 1902.

June 26, 1902. Defendants' exceptions to the findings of the court, and also to the refusal of the court to find additional findings, filed and overruled.

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June 26, 1902. Defts. exceptions to findings of court overruled June 26, 1902.

June 26, 1902. Defendants application for allowance of appeal filed April 22, 1902, allowed in open court this day.

July 21, 1902. Letter of Judge Peelle relative to record on appeal filed.

July 22, 1902. Attested transcript of judgment delivered to atty. of record.

July 24, 1902. Record on appeal delivered to Felix Brannigan, esq.

Jan'y 12, 1903. Mandate of the Supreme Court of the United States dismissing the appeal for want of jurisdiction filed in open court.

May 7, 1903. Motion of J. J. Hemphill to be entered as atty. of record of Samuel J. Ritchie with power of atty. filed. Handed judges.

May 11, 1903. Motion for allowance of appeal provided for by the act of March 3, 1903, filed. Copy & notice to clmts. atty. Handed judges. To law calendar.

May 23, 1903. Motion of May 7, 1903, allowed without prejudice to any right or lien of the former atty.

June 1, 1903. Claimants' application for appeal filed; defts. notified.

Oct. 19, 1903. The application for an appeal filed May 11, 1903, was argued by Mr. Howard for the motion and by Mr. Fay opposed, and submitted.

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Oct. 22, 1903. Clmts. brief on motion for a second appeal filed. Copies to defts.; also, copies sent to the court.

Oct. 26, 1903. Application of defendants for allowance of appeal to the Supreme Court, U. S. Allowed.

Oct. 27, 1903. Memorandum of points and authorities for the defts., on the motion for allowance of appeal filed. Atty. notified.

Nov., 1903. Delivered Asst. Atty. General Pradt record on appeal to the Supreme Court of the United States, and a certified copy of the general docket entries in this case.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing pages, numbered from one to fourteen, inclusive, contain a true and complete transcript of the general docket entries in the case of Elias E. Barnes vs. The District of Columbia, No. 47.

Test this 19th day of November, 1903.

[SEAL.] JOHN RANDOLPH,
Asst. Clerk, Court of Claims.

(Indorsed:) File No. 19135, Supreme Court, U. S., October term, 1904, term No. 143. The District of Columbia, appt., vs. Elias E. Barnes. Certified copy of docket entries in Court of Claims. Filed Nov. 21st, 1903.

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